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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 838

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 8,
Petitioners,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 25, 1955.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court for the District of Oregon denying motions for a new trial, after judgment was entered upon jury verdicts, and containing, as an appendix, the instructions to the jury, is reported at 107 F.Supp. 805. The opinion of the Court of Appeals affirming the judgment of the trial Court is reported at 226 F.2d 875. Both of these opinions are printed in the appendix hereto, as are the judgment of the Court of Appeals and its order denying petitions for rehearing.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 25, 1955. A timely petition for rehearing, filed by petitioners, was denied on January 11, 1956. The jurisdiction of this Court is invoked under 28 USCA 1254(1).

QUESTIONS PRESENTED.

Petitioner Local 8 is a labor organization representing longshoremen employed in Portland, Oregon. Petitioner International is a labor organization composed of various locals of longshore and other workers employed generally on the Pacific Coast and in Hawaii. Petitioners, together with more than one hundred individuals, most, if not all, of whom were members of Local 8, were named as defendants in a suit commenced by respondent in the District Court.

The original complaint alleged that the District Court had jurisdiction of the cause of action by virtue of Section 303 of the Labor Management Relations Act of 1947, Act of June 23, 1947, c. 120, Section 303, 61 Stat. 158, 29 USCA 187 (R. 1). After petitioners had filed motions to dismiss, to strike, and to make more certain (R. 14-14d), as well as answers (R. 14d-29), the District Court granted respondent leave to file an amended complaint (R. 30). The amended complaint alleged in one count that the District Court's jurisdiction rested upon diversity of citizenship (R. 31) and in two others that it rested upon Section 303, *supra* (R. 44-45).

In all three counts respondent generally alleged that petitioners and the individual defendants had conspired to injure respondent's business by preventing the unloading of a cargo of pineapple shipped by respondent from Hawaii to the mainland. While the motions and answers previously filed were deemed to be directed to the amended complaint (R. 201-03), the District Court refused to rule upon the questions presented by the motions (R. 203, 291) because "the pleadings are going to pass out of the case" (R. 188). A motion to sever the instant case from assault and battery cases brought by two employees of respondent was denied (R. 226-27, 307, 318).[1] A pre-trial order was entered embodying the contentions of the parties and the issues to be litigated. (R. 50-76.)

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[1]A jury verdict in favor of these two employees was followed by a settlement and no appeal affecting them was taken to the Court of Appeals.

After trial, the jury returned a verdict in favor of respondent and against petitioners and assessed damages in the sum of $201,274.42. (R. 136.)[2] A judgment in accordance with this verdict was duly entered. (R. 140-41.) Motions for a new trial on behalf of petitioners were denied (R. 146-48), the trial Court holding, *inter alia,* that the complaint stated a cause of action "under the Federal Labor Management Relations Act . . . [and] . . . under the common law" (107 F.Supp. at 809; R. 155; App. p. 9).

After the appeal was briefed and argued and had been under submission to the Court of Appeals for about six months, that Court requested further briefing and then, some six months later, affirmed both the judgment against petitioners and the order denying their motions for a new trial. The Court held that a cause of action was stated under Section 303 of the Labor Management Relations Act and that the trial Court had jurisdiction thereof; that the evidence supported a finding that petitioners violated that section; that it was not error for the trial Court to give a peremptory instruction that certain named individuals were "agents and representatives" of petitioners; that the instructions on the authority of the officers of petitioners were adequate; that the verdict imposing damages upon petitioners was not inconsistent with the verdict exonerating from liability every in-

[2]The jury, however, also returned a verdict in favor of the individual defendants and against respondent. Upon respondent's appeal from the judgment entered on this verdict and from an order denying its motion for a partial new trial, both the judgment and the order were affirmed.

dividual defendant despite the fact that among those exonerated were officers of petitioners and persons described in the instructions as "agents and representatives" of petitioners; and that, despite respondent's failure to minimize damages, the verdict could stand.

The questions presented by the foregoing are:

1. Whether the complaint stated a cause of action under Section 303 of the Labor Management Relations Act of 1947 and whether the trial Court had jurisdiction thereof; whether the trial Court correctly instructed the jury on the constituent elements of such a cause of action; and whether the evidence supported a finding that that section had been violated;

2. Whether the instructions that certain named individuals were "agents and representatives" of petitioners deprived petitioners *pro tanto* of a jury trial upon this important and sharply contested question of fact; and whether, in other respects, the instructions dealing with the liability of petitioners for the conduct of their officers adequately stated the criteria established in Sections 301 and 303 of the Act;

3. Whether the verdict imposing damages upon petitioners was not inconsistent with that exonerating the individual defendants from liability and whether therefore it should not have been set aside;

4. Whether the verdict could stand despite respondent's failure to minimize damages.

STATUTES INVOLVED.

Sections 301 and 303 of the Labor Management Relations Act of 1947, *supra*, are printed in the appendix hereto.

STATEMENT.

In the summer of 1948 there occurred an extended strike of longshoremen in the Hawaiian Islands, the chief protagonists being, on the one side, International's Local 136 (not a party to this proceeding), and on the other, the largest of the Hawaiian employers, commonly known as "The Big Five". The strike was the culmination of many years of attempted organization in the Islands and represented a major effort by the Hawaiian working people to free themselves from the literally substandard conditions under which they theretofore had lived and worked. (R. 537.)[3] The employers adopted an arrogant, intransigent attitude in the course of the strike and

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[3] "Q. Did he tell you that over the years those five corporations, which dominated the economic life of the Hawaiian Islands, had paid to workers in Hawaii wages at a starvation level? Did he tell you that?

A. He did, sir.

Q. Did he tell you that his union and its locals in Hawaii, particularly the Hawaiian Local No. 163 [sic], had organized those workers who were receiving those starvation wages, and were endeavoring to raise the standard of living of those people? Did he tell you that?

A. Yes, he did.

Q. And did he tell you that the Hawaiian Pineapple Company was controlled and dominated by those five large corporations? Did he tell you that?

A. Yes, I believe he did. It was quite a complete summary, sir." (R. 537.)

rejected all offers of settlement either by direct negotiation or by arbitration. (R. 540 ff.; Ex. 23.)

Respondent, which had close economic ties with the Big Five (R. 1073-74, 1166-78), knew that it would be difficult, if not impossible, to transport cargo from the Islands to the United States by the methods it normally used (R. 1018, 1289). Despite this fact, and the further fact that its contracts with its customers in the United States contained clauses which relieved it from liability for failure to deliver in the event of strike conditions (R. 958-59, 1161, 1292), respondent assembled a barge-load of pineapple in the Islands to be transported to the mainland by a tug chartered by one of respondent's wholly owned subsidiaries (R. 50). Although the pineapple was allegedly destined for the company's packing plant in San Jose, California, the cargo was shipped not to the Bay Area but to the Pacific Northwest. (R. 540, 1289.) Although The Dalles was not a port at which ocean-going vessels ever called or which had ever discharged trans-Pacific cargo (R. 544), respondent directed its barge there for unloading. Prior to the arrival of the barge, the Commissioners of the Port of The Dalles had agreed with respondent to unload it, although the port had neither facilities for unloading nor employees to perform such work. (R. 545.)

About a hundred miles west of The Dalles was the metropolitan city of Portland, with tremendous wharfage and dock facilities and thousands of skilled longshoremen (members of Local 8) who made their living and supported themselves and their families by

loading and discharging cargo. For The Dalles, a small port which handled an occasional load of local wheat, to undertake to discharge under nonunion conditions, transoceanic cargo, represented an obvious threat to the economic well-being of the Portland longshoremen. Therefore, when it became known in Portland that The Dalles was undertaking longshoring operations without consulting with the union and was about to employ farmhands to perform such work at sub-union wages, a good many Portland longshoremen went to The Dalles to investigate the situation and to protest this obvious threat to their livelihood. (R. 1239, 1263, 1365.) They were at The Dalles for two or three days late in September, 1948, during which period of time a riot erupted, as a result of which considerable damage was done to the dock property and some to the property of respondent.

An assistant chief of police (R. 592) called as a witness by respondent described what happened:

> "Q. Would you tell the jury just what happened—I want you to describe the beginning of this invasion of the dock.
>
> * * * * * * *
>
> A. Well, as I stated before, two flatbed trucks had come in——
>
> Mr. Krause. Q. I don't want you to repeat that. I want you to tell us something about the manner in which it was accomplished, the rapidity with which it was done, and anything else you can tell us about the attitude of the men.
>
> A. Well, it just flared up in a moment. It just flared up like that and was over within just a very few minutes.

Q. The entire riot, you mean?

A. The entire riot, yes." (R. 608-09.)

* * * * * * *

"Q. And then somebody said, 'Come on, you sons-of-bitches. Are you going to let them break our strike' or words to that effect?

A. Yes, sir.

Q. And that was, as you said a moment ago, completely spontaneous, wasn't it?

A. Yes, sir.

Q. In other words, just as though somebody had thrown a match into a can of gasoline and it went up in smoke?

A. Just about that fast." (R. 632-33.)

Thereafter injunction proceedings were brought in the state courts and, after protracted litigation and negotiations, at the conclusion of which the Port paid union wages (R. 488), the barge was finally unloaded and the cargo transported to San Jose.

It is petitioners' contention here that despite the evidence of violence,[4] the judgment cannot stand because of serious errors of law which occurred below.

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[4] "The fact that physical violence was threatened should not be allowed to confuse the picture." (Staley, J., in *United States v. Kemble*, 198 F.2d 889, at 899, wherein a conviction against a union for an alleged violation of the Hobbs Act [18 USC (1940 ed.) 420d; 18 USCA 1951] was reversed.)

See also *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 ("In the instant case the violence on the picket line is not material."), and *International Union Etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253 ("While the * * * Board is empowered to forbid a strike because its purpose * * * is illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property").

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred in holding:

1. That the complaint stated a cause of action and that the District Court had jurisdiction under Section 303; that the trial Court correctly instructed the jury on the elements of a cause of action under Section 303; and that the evidence was sufficient to sustain a finding of a violation of Section 303;

2. That the trial Court correctly instructed the jury on the liability of petitioners for the acts and conduct of certain of their officers; and that the trial Court correctly instructed that certain specified persons were "agents and representatives" of petitioners, thereby withdrawing from the jury the resolution of this sharply contested question of fact;

3. That there was no inconsistency between the verdict exonerating the individual defendants and that fastening liability on petitioners; or, that if there was an inconsistency, it was legally immaterial;

4. That despite the failure of respondent to minimize damages the judgment in its favor could stand.

REASONS FOR GRANTING THE WRIT.

I.

THE HOLDINGS OF THE COURTS BELOW THAT THE COMPLAINT STATED A CAUSE OF ACTION UNDER SECTION 303 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, THAT THE TRIAL COURT HAD JURISDICTION THEREOF, THAT THE INSTRUCTIONS CORRECTLY STATED THE LAW WITH RESPECT THERETO, AND THAT THE EVIDENCE SUPPORTED A FINDING OF A VIOLATION THEREOF, ARE CONTRARY TO THE LAW AND CANNOT BE SUSTAINED.

The Court of Appeals held that the complaint stated a cause of action under Section 303 and that the issues "properly went to the jury on the basis that . . . there was no legal excuse for any defendant to attempt to boycott a cargo of [respondents]". (226 F.2d at 879; R. 1502; App. p. 78.)

But there was evidence which, if accepted by the jury, would have established the "legal excuse" for any boycott which was shown to exist. Section 303 illegalizes only secondary boycotts. Yet it was applied in this case without any consideration of the fact that there was considerable evidence of primary activity. For example, the members of petitioner Local 8 were directly concerned in the hiring practices and pay scales of the Port of The Dalles and made legitimate demands on it respecting those matters. (R. 766, 806-07, 838, 877, 900, 902, 1240, 1365.)[5]

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[5] "[We were picketing] [f]or the reason that our wage structure and our hours of employment, conditions of labor, were being endangered; that the work was being carried on by members of other organizations, and we had contracts for that work in every port on the Pacific Coast. We were picketing because they were working the men 8 hours a day for a dollar and a half an hour, when our wage scale was $1.82 and time and a half after 6 hours. We were picketing because, too, we have a 2100-pound load limit

They were concerned with these matters whether the unloading at The Dalles was to be done by the Port, or directly by respondent. (R. 1285-86.) There was also evidence that respondent was so closely allied to the Big Five companies which were being struck that the activities against it were legally protected. (R. 537, 541, 1072, 1177.) In the face of such evidence it was error for the Court below to sanction the submission of the case to the jury on the theory that there was "no legal excuse" for petitioners' activities.[6]

It is clear that even primary labor disputes have secondary effects and that if Section 303 is read literally, it will outlaw even primary peaceful picketing. In order to avoid such results, which are at conflict with the clearly expressed legislative intent[7] as well as with constitutional guarantees (*Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S.

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in our contract, and these people were unloading as much as they could reach up and pile the cases on. They were breaking down our conditions." (R. 806.)

[6]Indeed, the instructions of the trial court went so far as to illegalize conversations in which truck drivers were told no more than that "the port of The Dalles was threatening the working conditions and wages of the Portland longshoremen". (R. 1427.)

[7]Senator Taft described the objectives sought to be attained by the enactment of the section as follows:

> "• • • under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." (93 Cong. Rec. 4198.)

The legislative history was thoroughly explored, and the conclusion here asserted was arrived at by this Court, in *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 686, and *N.L.R.B. v. International Brotherhood of Electrical Workers*, 341 U.S. 694, 705.

106), this and other Courts have required clear proof of secondary activity and have refused to find a statutory violation in the absence thereof. *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665; *Douds v. Sheet Metal Workers Union*, 101 F.S. 273 (E.D. N.Y.); cf. *Oil Workers International Union and Pure Oil Co.*, 84 N.L.R.B. 315. Since there was evidence of primary activity at The Dalles, the instructions approved by the Court below on the theory that there was "no legal excuse" for petitioners' economic activities were in direct conflict with the pronouncements made by this and other Courts in the foregoing cases.

Furthermore, before Section 303 can apply it must be shown that there is economic injury to an employer totally disinterested in the main conflict. (cf. *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665; *Douds v. Sheet Metal Workers Union*, 101 F.S. 273 [E.D. N.Y.].) Indeed, even where the employing units are separate legal entities, a close economic relationship between them renders the section inapplicable. (*Douds v. Metropolitan Federation, Etc.*, 75 F.Supp. 672 [S.D. N.Y.]; *N.L.R.B. v. Business Machine, etc.*, 228 F.2d 553 [2 Cir.].) In the face of these cases and the evidence of the relationship between respondent and the struck companies (R. 537, 541, 1072)[8], it was

[8] "Through a complex system of interlocking directorates, the Big Five is able to exert sufficient influence to control most of the Territory's economy. Their *sphere of domination* extends not only to the two basic island industries, sugar and *pineapple*, but encompasses such diverse fields as shipping, banks, and trust companies, wholesale and retail food and mercantile stores, press and radio, lumber and building materials, public utilities and tourist

error for the trial Court to remove from the consideration of the jury the issue of the existence of primary activities as a justification for the boycott and it was error for the Court below to hold that there was "properly . . . no legal excuse" for the boycott.

Other errors of the trial Court on this phase of the case which are not treated in the opinion of the Court below are:

(A) An instruction that a railroad company was a "person" within the meaning of Section 303. (R. 1424-26.)* This holding below is in direct conflict with the National Labor Relation Board's construction of the same section. (*International Brotherhood of Teamsters,* 84 N.L.R.B. 320.) To resolve this conflict the writ should issue.

(B) The instructions as to which was the primary and which was the secondary employer are confusing, inconsistent and ambiguous. Two opposing theories are embodied in the instructions: one, that

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trade, among others." Comment: *Alaska and Hawaii: From Territoriality to Statehood,* 38 Calif. L. R. 273, 274, n. 2 (1950).

The court below said that this contention "does not seem to have been proved to the point of any jury question" (226 F.2d at 879; R. 1502; App. 78), thereby overlooking the fact that the trial court by its rulings prevented a full development of the evidence (R. 1177, 1453).

*This is important for there was some evidence from which it could be inferred that petitioners interfered with business between respondent and the Union Pacific Railroad Company and that this prevented respondent from hauling its pineapple to San Jose in time to prevent the damage. The opinion of the Court below fixes the delay as the period between September 24 and October 19, 1948, "when [respondent] started to move the cargo via Union Pacific." (226 F.2d at 877; R. 1500; App. p. 75.)

the respondent was the prime employer;[10] the other, that respondent was "the other person" mentioned in Section 303.[11] Clearly, respondent could not have been both the employer and the other person contemplated by Section 303; the jury was never told which one it was.[12] Whether a judgment based on

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[10]"If the Plaintiff Hawaiian Pineapple Company, Ltd., has established by a preponderance of the evidence that the International, by and through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8, induced or encouraged the employes of Plaintiff Hawaiian Pineapple Company, Ltd., to engage in a concerted refusal in the course of their employment to transport, handle or work on the cargo of pineapple in commerce, or to perform any services in connection therewith at The Dalles, Oregon, with the object of forcing or requiring Plaintiff Hawaiian Pineapple Company to cease doing business with the Union Pacific Railroad, one of the various trucking companies whose names I gave you a few minutes ago, the Goodat Crane Company, or any of them, or with its customers in the State of California, to whom the cargo was to be shipped, or any of them, and it is further established that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover as against the defendant union or defendant unions doing the acts with the intent described." (107 F.Supp. 821; R. 1424-25; App. p. 41.)

[11]"Similarly, if plaintiff has established by a preponderance of the evidence that the International, by and through its officers and agents and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8 induced or encouraged the employes of either the Goodat Crane Company, the Portland-Pendleton Motor Transport Company, Consolidated Freightways, Oregon-California-Nevada Fast Freight or any other trucking lines doing interstate business from The Dalles, Oregon, to engage in a concerted refusal in the course of their employment to refuse to transport, handle, work on or perform any services in connection with plaintiff's cargo or with the object of the forcing or requiring either Goodat Crane Service or any of the trucking lines, or both, to cease doing business with the plaintiff, and you further find that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover." (107 F.Supp. 822; R. 1425-26; App. p. 42.)

[12]Timely exceptions were taken to each of the above-quoted instructions. (R. 1454-55; 1457.)

a verdict can stand in the face of such an equivocal charge is a question which this Court has not, but should, settle. (Cf. *Bollenbach v. United States*, 326 U.S. 607.)[13]

II.

THE HOLDINGS OF THE COURTS BELOW WHICH PREVENTED THE JURY FROM PASSING UPON THE QUESTION OF WHETHER CERTAIN NAMED PERSONS WERE "AGENTS AND REPRESENTATIVES" OF PETITIONERS, ARE CONTRARY TO THE LAW AND CANNOT BE SUSTAINED.

The Court below recognized that "abstractly" the unions themselves could do nothing; that they could act only through human agents. (226 F.2d at 879; R. 1502; App. p. 78.) This of course points up the importance of the instructions on the agency question and demonstrates that any error committed in this area was of necessity prejudicial.

Despite the fact that there was the sharpest conflict between the parties as to whether certain specified persons were in fact agents of petitioners (R. 67), and despite the fact that there were indeed factual questions presented on this issue, the trial Court, with the approval of the Court below, flatly instructed the jury that certain specifically named persons were "agents and representatives" of petitioners. (226 F.2d 879; R. 1503; App. 79.)

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[13]The Court below acknowledged the novelty of this, as well as of a number of the other questions presented by this case. (226 F.2d at 880, 882; R. 1503, 1507; App. pp. 80, 86.)

The Court below justified this instruction with the observation that while there is "surprisingly" little case law on the "agency feature" of the statute, it believed that the statute was intended to cover situations in which "a union puts or lets an officer or other representative get into a position where he can and does cause trouble". (226 F.2d at 880; R. 1503; App. 80.) But whatever may be the validity of this proposition as an abstract matter of law, its assertion does not afford a solution to the problem presented by the peremptory instruction. The questions which the jury had to consider were (1) whether the named persons were in fact "officers or representatives" and (2) whether the unions did indeed put them, or let them get, into positions where they could cause trouble. The unions denied both that the persons in question were their agents or representatives and that the unions had placed them in such positions. There was evidence which supported those denials.[14] Therefore it was error to approve an instruction which took from the jury its fact-finding func-

[14]Thus, the trial Court instructed that Meehan was an "agent and representative" of the International. The record contains the following evidence concerning Meehan:

"It should be clear, however, in order to avoid any confusion in your area, that you are not empowered to direct or apply a policy on your own, but can do so only when specifically instructed by the International officers, and only at such times are you empowered to act in behalf of the International Union." (R. 1217.)

• • •

"A. • • • But I wasn't an officer. Only elected officials are officers in our union. I couldn't commit the International to anything.

Q. You what?

A. I couldn't commit the International to anything.

Q. To anything?

tion by telling it that certain named persons were in fact "agents and representatives" of petitioners.

Other circuits have long since decided that the existence of an agency relationship (in addition to the question of its course and scope) is a question of fact to be determined, upon a record containing conflicting evidence (as does this one), by a jury. *Quinlan v. Holbrook,* 162 F. 272 (2 Cir.); *Denton v. Brocksmith,*

A. That is right. I was restricted to whatever was required by the locals concerned.

Q. Then when you go into a local situation, and when you are so representing them, do you represent the local, or do you represent the International?

A. I represent the local.

Q. You say you are without authority to commit the International to anything?

A. I have no authority to commit the International, no." (R. 1337.)

"Q. All right. By the way, Mr. Meehan, who had instructed you to contact these other union officials? • • •

Q. I said union officials, you understood; not Port officials.

A. Oh, Bob Baker [President of Local 8] asked me to——

Q. Oh, Bob Baker told you to contact the union officials?

A. Any unions that I could contact." (R. 1371-72.)

Similarly, the instruction embraced Schmidt and Bodine. As to them the record reveals:

"Q. Isn't that the Mr. Schmidt who is also one of the officers of the ILWU?

A. No. He is no officer of the ILWU.

• • •

Q. You say that he is not an officer of the International?

A. He was never an officer of the International Union. He was president of Local 10.

Q. He was president of Local 10?

A. Yes, sir." (R. 704.)

• • • • • • • •

"Q. To San Francisco, to Mr. Bodine or to Mr. Thomas?

A. Yes.

Q. Those are both officials of the ILWU, are they not?

A. No. They are what are known as coast committeemen. They are officials of the Longshoremen Division. They are not officials of the International. They are elected by the longshoremen to represent them in negotiations and in the implementation of the longshore contract." (R. 717.)

299 F. 559 (5 Cir.); *Sloat-Darragh v. General Coal Co.*, 276 F. 502 (6 Cir.); *Riverside Fibre & Paper Co. v. O. C. Keckley Co.*, 32 F.2d 23 (7 Cir.); *Mitton v. Granite State Fire Insurance Co.*, 196 F.2d 988 (10 Cir.). Indeed, in an earlier case the Ninth Circuit itself so held. *Pacific Can Co. v. Hewes*, 95 F.2d 42 (9 Cir.).

The earlier holding, which should have been followed here, was based squarely upon this Court's decision in *Gunning v. Cooley*, 281 U.S. 90, wherein it was pointed out that:

> "Issues that depend upon the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining the motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. . . . Where uncertainty . . . arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." (281 U.S. at 94.)[15]

Here, of course, as we have seen, *supra*, note 14, there was testimony which if believed (credibility),

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[15] In *United Brotherhood of Carpenters v. United States*, 330 U.S. 394, this Court stated that no matter how conclusive the evidence on the agency question might be (and here, as we have seen, there was conflict), a failure to permit the jury to resolve the question requires the reversal of the judgment.

or which if given the effect or weight urged for it by petitioners, would establish the absence of an agency relationship—or at least would demonstrate that whatever relationship existed was not with petitioner International but only with the local. Petitioner International presents this as a separate point on its own account.

Since, as the Court below conceded, the unions could not have been held in this case "without a finding by the jury" (226 F.2d at 880; R. 1503; App. 80) that persons in authority were responsible for what had transpired,[16] and since there was sharp conflict as to who in fact was in authority and what his or their relationship to each petitioner was, the jury should have been permitted to make its own finding from the evidence and should not have been peremptorily told what it was to find.

In view of the conflict between the decision below and that of other circuits on this question, and in view of the departure by the Court below from the principles enunciated by this Court in the *Gunning* and *Carpenters* cases, *supra*, this question requires resolution here.

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[16]Indeed, the Court recognized that the judgment against the unions could not have been sustained "on the bare conduct of the rank and file." (226 F.2d at 880; R. 1504; App. 80.)

III.

THE HOLDING OF THE COURT BELOW PERMITTING AN INCONSISTENT VERDICT TO STAND IS CONTRARY TO THE LAW AND CANNOT BE SUSTAINED.

The opinion of the Court below indicates that this point caused it the greatest of difficulty. The Court prefaced its discussion with the observation that it was "difficult to understand" how the jury, which found none of the individual defendants liable, could nonetheless have imposed liability upon the unions. (226 F. 2d at 881; R. 1505; App. p. 82.) And after a long discussion in which it (an appellate court) advanced a whole series of hypotheses by which the verdicts might conceivably be reconciled, none of which was presented to the jury at the trial, it concluded the opinion with the following remarkable observation:

> ". . . there was probably an inconsistency in the verdict; but, as we have held, it is a case where the jury had a right to be inconsistent. But finally we cannot say there was inconsistency." (226 F.2d at 884; R. 1510; App. p. 90.)

It is petitioners' contention that by affirming a judgment entered upon a verdict imposing liability on the principals while at the same time exonerating the "agents", the Court below decided the case in a manner which directly conflicts with the principles enunciated by this Court, and with decisions in other circuits, and that in so doing, the Court below so far departed from accepted legal principles as to require a review of its decision here.

The Court below recognized, as we have already seen, that petitioners' liability had to be based on a

jury finding "that some . . . persons in authority were responsible for what transpired . . ." (226 F.2d at 880; R. 1503; App. p. 80.) This was simply applying to this case the universally recognized doctrine of *respondeat superior.* But what the Court neglected to do was to apply the equally universally recognized converse of that doctrine: that where the liability of a principal is predicated upon the alleged tortious acts of its agents or employees, the exoneration of the latter necessarily requires the exoneration of the former.

This Court said many years ago:

> "It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity . . .
>
> "[I]f an act of an employee be lawful and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to his employer therefor." (*New Orleans & Northeastern RR. Co. v. Jopes,* 142 U.S. 18.)[17]

Lower federal tribunals have consistently applied the rule and have set aside judgments based upon inconsistent verdicts such as those returned here. *Dixie Ohio Express Co. v. Posten,* 170 F.2d 446 (5 Cir.); cf. *Portland Goldmining Co. v. Stratton's Inde-*

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[17]For a general statement of the rule, see 2 Am. Jur. 361, *Agency,* Section 455; 30 Am. Jur. 977, *Judgments,* Section 249; 35 Am. Jur. 962, *Master and Servant,* Section 534; and 53 Am. Jur. 726, *Trial,* Section 1049.

pendence, 158 F. 63 (8 Cir.); *King v. Stuart Motor Co.,* 52 F.S. 727 (N.D. Ga.); *Weekley v. Pennsylvania R. Co.,* 104 F.S. 899 (E.D. Ill.) This is equally the rule in Oregon, where the action here was tried. *Dare v. Boss,* 111 Or. 190, 224 P. 646.

The Court below, however, relied upon *Dunne v. United States,* 284 U.S. 390, and *Jayne v. Mason and Dixie Lines,* 124 F.2d 317 (2 Cir.), neither of which is applicable here.

The *Dunne* case was a criminal prosecution in which the single defendant was acquitted on counts of unlawfully possessing and selling liquor, but convicted on a count of maintaining a nuisance by keeping liquor for sale. Clearly, a criminal case cannot present the *respondeat superior* problems posed by the case at bar for no question of vicarious liability can exist in such a case. Furthermore, the verdicts there were not inconsistent, for one may maintain a nuisance without necessarily having the possession of, or selling, the liquor. Finally, as this Court itself pointed out (284 U.S. at 393), each count of the indictment must be regarded as a separate indictment; and if the defendant had been tried on separate indictments, an acquittal on any one of these three charges could not have been pleaded as *res judicata* of the others. The reverse is true in the civil cases where the prior exoneration of the agent requires, under the principles of *res judicata,* the dismissal of the action against the master. *King v. Stuart Motor Co.,* 52 F. Supp. 727 (N.D. Ga.); *Weekley v. Pennsylvania R. Co.,* 104 F.Supp. 899 (E.D. Ill.).

Nor did the *Jayne* case involve an inconsistency in verdicts such as we have here. There, a wife riding with her husband driver was permitted to recover damages against a third party defendant, despite a verdict of contributory negligence against her husband. Since, under the applicable local law, "his fault was not to be imputed [to her]" (124 F.2d at 319), and since, therefore, the rights and liabilities of the parties were governed by different legal principles, the results reached were not really inconsistent. In any case, no problem of imposing vicarious liability upon a principal for the alleged tortious acts of his agent was involved.

In the case at bar, however, the verdict in favor of the individual defendants necessarily required a verdict in favor of petitioners. This is so because the causes of action set up against all defendants, both the individuals and the unions, were identical. Petitioners' liability was, as it obviously had to be, predicated upon the doctrine of *respondeat superior*. There was no special defense open to the individuals not open to petitioners which would justify the results reached here.

As to the individual defendants the jury was instructed that there had to be a finding of a "conspiracy" before a verdict could be returned against them. (R. 1436-37.) But in exonerating the individuals, the jury found that the individuals did not conspire. Since the individuals did not conspire, then neither did the unions; for the unions could not conspire in the abstract, but only through and by means

of the individuals involved (as indeed the trial court charged [R. 1434]). Since the jury exonerated each and every alleged individual conspirator, there is no basis upon which it could have found that the unions "conspired" *in vacuo,* so to speak, to commit the tort.

The Court below has permitted a judgment of over $200,000 to stand against two trade unions, although the jury upon whose verdict that judgment was based has said that every single officer, "agent and representative" of those unions, and indeed, even their rank and file members, were not guilty of any tortious conduct. In reaching this result, the Court below, ignoring the rules of law usually applied in *respondeat superior* cases, has rendered a decision in conflict with principles enunciated by this and other federal Courts; it has also raised questions of importance respecting the application of Sections 301 and 303 of the Labor Management Relations Act of 1947. For these reasons the judgment below should be reviewed by this Court.

IV.

THE JUDGMENT CANNOT STAND BECAUSE RESPONDENT MADE NO EFFORT WHATSOEVER TO MINIMIZE ITS DAMAGES.

This Court has recognized the universally accepted principle of law that:

> ". . . a person seeking to recover damages for the wrongful act of another must do that which

a reasonable man would do under the circumstances to limit the amount of the damages." (*Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489.)[18]

On the record here it is indisputable that respondent failed to take any action at all to minimize its damages, although it had ample opportunity to do so.

The Court below conceded that the arguments advanced by petitioners on this phase of the case were "quite convincing" (226 F.2d at 880; R. 1504; App. p. 81), but was of the view that this was solely a jury question and that it would sustain any verdict the jury returned. However, a verdict for "the total amount" which respondent sought (226 F.2d at 880, n. 6; R. 1504, n. 6; App. p. 81, n. 6) cannot be permitted to stand in the face of conclusive evidence that respondent rejected all opportunities to reduce those damages.

We have already noted in the Statement, *supra*, that respondent could, without any loss to itself, have cancelled its contracts. One of its officers admitted that, had respondent chosen, it could have saved $142,000 by so doing. (R. 968.) Secondly, non-Hawaiian sources of pineapple, which, if used, would have eliminated practically all of the loss, were available to respondent (R. 1288) just as they were to other

[18] In *Warren v. Stoddart*, 105 U.S. 224, 229, it was said:
"... where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

nationally known fruit packers. (R. 1290.) Thirdly, alternative and less wasteful methods of using the fruit already on hand were also available to respondent. (R. 970-71, 1154-55.)

To sustain a verdict for the maximum amount of damages on such a record not only is contrary to the expressions of this Court as already noted, but conflicts directly with decisions of other Courts of Appeals. In *W. B. Moses & Sons v. Lockwood,* 295 F. 936 (D.C. Cir.), the Court of Appeals for the District of Columbia in reversing a judgment for plaintiff because of the failure to minimize damages, stated the reason for the rule:

> "Damages which may be avoided by doing what an ordinarily prudent man would do are not the direct or natural consequences of the defendant's wrong, since it is plaintiff's option to suffer them. In such a situation the plaintiff is damaged not by the defendant's act, but his own negligence or indifference to the consequences." (295 F. at 941.)

Other circuits have uniformly held the same way. *United States v. Brookridge Farm, Inc.,* 111 F.2d 461 (10 Cir.); *John S. Doane Co. v. Martin,* 164 F.2d 537 (1 Cir.);[19] *Texas Co. v. Christian,* 177 F.2d 759 (5 Cir.); *Pasquel v. Owen,* 186 F.2d 263 (8 Cir.).

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[19]In this case the Court said:

"Under the general rule of damages where one is injured or damaged by the wrongful act of another, he is bound to exercise reasonable care and diligence in mitigating the resulting damage. The Act [providing for veterans' reemployment] was intended for the benefit of the veteran and not to penalize the employer. There is nothing in it which indicates that the compensation for loss of wages shall not be mitigated

Indeed, the record now before this Court impels a finding that respondent not only failed to mitigate its damages, but permitted them to mount up for the purposes of this litigation. There is a striking parallel to the situation presented in *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 55 (8 Cir.):

> "Arvel Blaylock's conduct in dealing with these shipments and making claims for loss of profits was obviously strategic, and stemmed from the defendant's refusal to accede to his demand that cans be shipped to the plaintiff free of freight, as well as from his interest in enhancing his alleged damages for the purposes of this lawsuit."

The affirmance of a judgment for the maximum amount of the damages sought, in the face of conclusive proof of the refusal to minimize those damages,[20] is contrary to the applicable rules of law and to the decisions of this and other federal courts, and raises a question of importance in connection with the proper measure of damages to be assessed in a suit under Sections 301 and 303 of the Act here involved. This Court should therefore undertake to review this case.

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and we see no hardship in placing this duty upon the veteran." (164 F.2d at 541.)

Similarly, Section 303 of the Labor Management Relations Act of 1947 was intended for the benefit of the employer and not to penalize the union, nor is there anything in it which indicates that the usual rule requiring mitigation of damages is not to apply.

[20]The passion and prejudice engendered against petitioners by the coupling of this statutory cause of action with the assault and battery suits (supra, p. 3) may explain, but not justify, the jury's verdict on this, as on the previous, point.

CONCLUSION.

For the foregoing reasons the writ of certiorari should issue and the judgment below should be reversed.

Respectfully submitted,
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San Francisco, California,
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(Appendix Follows.)